Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-1643

MARTIN WILLARD HOULTIN,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

## PETITIONER'S BRIEF IN REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

JOSEPH S. CHAGRA
Suite 718
Southwest Center
300 E. Main
El Paso, Texas 79901
(915) 533-4087

ATTORNEYS FOR PETITIONER

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 504 822 1611

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The Petitioner, MARTIN WILLARD HOULTIN, having filed his Petition For a Writ of Certiorari and having received the *Brief of the United States in Opposition*, respectfully submits his reply to the *Brief of the United States in Opposition*.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was reported as *United States v. Houltin*, 566 F.2d 1027 (5th Cir. 1977), (reproduced, Pet. App. 1a-26a). The prior opinion of the United States Court of Appeals for the Fifth Circuit involving this Petitioner's cause was reported as *United States v. Houltin*, 525 F.2d 942 (5th Cir. 1976), (reproduced, Pet. App. 28a-46a).

## JURISDICTION

This Court's jurisdiction is invoked under the authority of Title 28, United States Code, §2154, (Pet. 2). The Government contends in its *Brief in Opposition*, (Resp. 2), that this Petitioner's *Petition for Certiorari* was untimely by eight days. Should this Court find this to be the case, the Petitioner would note that such a defect is not jurisdictional, *Heflin v. United States*, 358 U.S. 415, 79 S.Ct. 451, 3 L. Ed 2d 407, 410 (1959), and would respectfully request that this Court exercise its discretion to consider his cause.

## QUESTIONS PRESENTED

1. Whether the Government should be allowed to retry a defendant whose conviction was reversed because of insufficient evidence, i.e., because all of the evidence against him was the result of an illegal wiretap. (restated from Pet. 2)

2. Whether the Government should be allowed to use the testimonial evidence of the co-defendants of



Petitioner herein who were convicted as a result of an illegal wiretap to which they lacked standing to object and who testified under a grant of use immunity at Petitioner's retrial. (restated from Pet. 3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (restated from Pet. 3).

2. The Fifth Amendment provides in pertinent part:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. (restated from Pet. 3).

## REPLY TO THE ARGUMENT OF THE UNITED STATES

### I

### Certiorari Should Be Granted To Clarify The Double Jeopardy Implications of Appellate Court Reversals For Insufficient Evidence.

This Petitioner places his primary reliance on the second question presented herein, that of whether the testimony used to convict this Petitioner was a forbidden fruit of an illegal wiretap and thus should have been excluded by the Court below. Nonetheless, in regard to the double jeopardy question, this Petitioner feels obligated to respond to the Government's extensive use of *Burks v. United States*, ___ U.S. ___, 98 S.Ct. ___, 57 L. Ed 2d 1 (June 14, 1978), a decision not available at the filing of this Petitioner's original *Petition for Certiorari*, (see Resp. 7-8). This Petitioner would admit that the general language of *Burks* would relegate some reversals dealing with the admission of evidence to the category of mere "trial error" reversal, thus not invoking the protections of the double jeopardy clause, *Burks*, 57 L. Ed 2d, at 12. However, *Burks* does not speak directly to the question in the instant cause. This question would be whether the Government may legitimately retry an individual after first consciously proceeding against him with suspect evidence. The word "consciously" is used because in this case the Government was on notice that its evidence was suspect from the very moment the trial Judge held the Government's wiretap to be illegal. The Government's knowledge as to the facts surrounding the wiretap and the federal agents' subsequent actions was, of course, vastly superior to that of the Defendants or that of the Court.

The Petitioner contends that such a prosecution invokes the protection of the double jeopardy clause. A contrary rule would be highly detrimental to the constitutional rights protected by the exclusionary rule. "Tainted" evidence would have a use in the prosecutor's arsenal. As in this case, the admission of



tainted evidence could be used to gain time and could be used to gain convictions of co-defendants lacking standing without risking anything but a retrial. Thus, the very use of tainted evidence could convert a bad case into a good one after a trial and an appeal. Any effective use of tainted evidence as noted above would not escape the notice of federal law enforcement officers, and thus would diminish the effectiveness of the exclusionary rule and the values it protects.

Secondly, if reversals grounded on the Government's use of tainted evidence could never invoke the protections of the double jeopardy clause, then there would be no legal bar to a string of consecutive prosecutions based on various restructurings of the tainted evidence as in the instant case. Would this not offend the principle set forth in *Burks* as being the very essense of the double jeopardy clause?

> To protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. (citations omitted) *Burks*, 57 L.Ed at 10.

Looking at the instant case, we can ask the question that if this Court were to grant certiorari and were to hold that the compelled testimony used to convict this Petitioner should have been excluded, could this Petitioner be tried again on another reformulation of the tainted evidence?

The Petitioner recognizes that the double jeopardy clause is the more difficult of two possible approaches

to the problems of *Houltin*. The exclusionary rule is much easier to apply given the facts of this case. However, it may very well be that the double jeopardy clause is the only real remedy in a case such as this.

## II

### Certiorari Should Be Granted To Prevent The Government From Diluting The Policy Behind The Exclusionary Rule of Deterring Official Misconduct And Unlawfulness.

In its *Brief for the United States in Opposition*, the Government placed its primary emphasis on *United States v. Ceccolini*, ___ *U.S.* ___, 98 S.Ct. ___, 55 L.Ed 2d 268 (1978), (Resp. 9, 10). However, the Government pointedly failed to make any close comparison between the determining factors set out in *Ceccolini* and the facts of the instant cause. Justice Rehnquist listed some six factors involved in the *Ceccolini* case which formed the basis of the Court's finding that the testimony was admissible: (1) the testimony was a product of the free will of the witness, in "no way coerced or induced by official authority"; (2) the tainted fruit was not used in questioning the witness; (3) substantial periods of time elapsed between the initial illegality and the initial contact with the witness; (4) both the identity of the witness and the relationship between the witness and the defendant was well known to those investigating the case; (5) the law enforcement officials did not commit the illegality in hopes of obtaining evidence or a witness as to the crime charged; and (6) that application of the exclusionary rule would not have the "slightest



deterrent effect" on the law enforcement officials involved, *Ceccolini*, 55 L.Ed 2d at 279. Looking at these factors closely, we see that they bear no resemblance to the case at hand.

1. *No inducement or coercion by official authority.* The witness in *Ceccolini* was found to have made her decision out of her own "free will," *Ceccolini*, 55 L.Ed. 2d at 279. In our case, the United States Attorney at the second trial admitted that the witnesses were unwilling witnesses, (IV R 28); likewise, the trial court also acknowledged this lack of willingness to testify, (IV R 28). Thus there was a lack of "free will" on the part of witnesses. On the part of official authority there was coercion. "Inducement" would be a euphenism in this case.

First, the illegal wiretap resulted in the arrest of the witnesses and the seizure of evidence to be used against them:

> The above summary of the evidence indicates that the defendants have carried their burden of proving that their apprehension and the marijuana seizure resulted from the exploitation of information gleaned from the illegal wiretaps. *Houltin I*, 525 F.2d at 948.

Second, the wiretap and its fruits were the basis of the prosecution and conviction of these defendants in the State of New Mexico, *Ibid*, at 945. Third, the fruits of the wiretap were used to prosecute and convict the defendants in a United States District Court in Texas, *Ibid*, at 945. Fourth, as a result of those convictions the

defendants were sentenced to the maximum imprisonment provided by law along with various fines and special parole terms, *Ibid*, at 945. Fifth, the convictions and sentences of defendants who were later to become witnesses were affirmed by the Fifth Circuit solely because of their lack of standing to object to illegal fruits of the wiretap, *Ibid*, at 946. Sixth, the Government granted the convicted defendants "use immunity[1]", thereby threatening them with contempt citations should they refuse to testify. *Houltin II*, 566 F.2d at 1032, 1037. Seventh, the final form of these witnesses' testimony was a word for word repetition of the testimony of the agents at the first *Houltin* trial, that earlier testimony having been barred as a fruit of the wiretap. *Ibid*, at 1036. Thus, the coercion of these witnesses began with the first use of the illegal wiretap to secure their arrest and continued to the point where they were compelled to repeat the words of the officer's testimony as to what they learned and did as a result of the illegal wiretap. To state that these former witnesses testified or that the testimony was "in no way coerced or even induced by official authority as a result of the [illegality]," is to destroy both the common and legal meaning of the descriptive words used in *Ceccolini*, 55 L. Ed 2d at 288.

2. *The use of fruits.* In *Ceccolini*, 55 L.Ed 2d at 279, a point was made that the fruits of the illegality were not

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1 After having been prosecuted and convicted by both sovereigns, the State of New Mexico and the United States, these defendants were granted "use immunity" by the United States and required under threat of contempt to testify as to offenses which were the basis of the above convictions. Such "use immunity" after having been fully prosecuted by both State and Federal Government is the emptiest immunity this Counsel has ever encountered and runs directly contrary to the principle of fundamental fairness inherent in our Criminal Justice System.



used to question the witness. Here, as pointed out above and in Judge Wisdom's dissent in *Houltin II*, the fruit of the illegal wiretaps, i.e., the testimony of the federal agents, "influenced", if not determined, what the evidence of the witnesses would be, *Ibid*, at 1036.

3. *Elapsed time.* Contrary to the facts in *Ceccolini*, the initial contact with the witnesses was made at their arrest, which was the very first "fruit" of illegal wiretap information gained only hours before. Thus, the initial contact was at least contemporaneous if not immediate.

4. *Knowledge of identities and relationship.* Here, the Government is on somewhat firmer ground. The Government did have some intelligence as to identities of the defendants, IV R 77, but as Judge Wisdom pointed out in his dissent in *Houltin II:*

> The Government did not have a fruitful source for the evidence before the taps. Although the federal agents knew the identities of all the conspirators, they have been unable to develop a case. Indeed, this inability to prove their case caused the investigators to place the illegal wiretap. (citation omitted) * * * Only because of the wiretap evidence did the prosecutor have available four witnesses who could be "immunized" without cost. *Houltin II*, at 1036.

5. *The illegality was not committed with instant prosecution in mind.* In *Ceccolini*, at 279, it was found that there was "not the slightest evidence to suggest"

that the illegality was committed "with the intent" to gain evidence on the prosecution in question. In our case, the Government agents had sought the illegal wiretap initially because of their failure to gain enough evidence against the defendants to charge them with narcotic violations, *Houltin I*, at 947; *Houltin II*, at 1036; and as their wiretap application revealed, this was the sole reason for placing the illegal wiretap, to gain evidence or witnesses so that the individuals could be charged with the same violations that they were ultimately charged with, *Houltin I*, at 947-948.

6. *Effect on deterrence.* In its *Brief in Opposition*, the Government has sought to characterize the law officers involved as "state authorities," (Resp. 10). This does not comport with the facts of the case. The record of the first trial is, of course, in accord. The record reveals that "case agent" supervising and coordinating the investigation was a Drug Enforcement Administration Agent for the Federal Government, (II R 431, 477-478); and that this "case agent" was assisted by other federal agents from the D.E.A. (II R 72, 250), and from United States Customs (II R 166, 192, 466). In *Houltin I*, the Fifth Circuit found that it was "a joint federal state investigation sponsored by the Drug Enforcement Administration (D.E.A.)," and that it was "the Government" [who] "admitted that its investigative procedures had failed and applied to the State Court in New Mexico for authorization to tap the telephones of Houltin, Morrison, and Burke." *Houltin I*, at 947. Although the attempt to analogize the above operation with the questionable activities of State Police Officer "Biro" in *Ceccolini* is apparent, the analogy does not lie.



Next, the Government contends, as in *Ceccolini*, that exclusion of the evidence would only have " 'a speculative and very likely negligible deterrent effect.' (citing *Ceccolini*)," (Resp. 10). Having viewed the character of operation above and noting the various federal agencies involved, the Government's contention that any exclusion of evidence by this Court would only have a "negligible effect," (Resp. 10), on these Drug Enforcement officers and Customs officers is an insult to their intelligence; and the inferrence that these officers would continue illegal wiretaps in spite of any pronouncement from this Court is a slur on their integrity. The officers of the Government must be given more credit than that, if only so that this pessimistic view of them will not become a reality.

In summary, our case is not *Ceccolini* by any measure. *Ceccolini*, and the cases cited by the majority in *Houltin II*, i.e.: *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963); and *United States v. Holsey*, 437 F.2d 250 (10th Cir. 1970), involve mere witnesses who are more or less inadvertently discovered as an unintended by-product of the primary illegality. That is not our case.

## FINAL ARGUMENT AND CONCLUSION AS TO WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

The facts of this case present clear and compelling reasons for the granting of a writ of certiorari. In his final argument and conclusion, this Petitioner would advance three additional reasons for granting certiorari in this case. First, the writ should be granted

because it involves a combination of the two areas of law recently explored by this Court in *Burks* and *Ceccolini*, and thus the timing is ripe for the consideration of this cause. Secondly, the writ should be granted because the question presented herein, which involves tainted and compelled testimony of convicted codefendants, is a case of first impression. As Judge Wisdom noted in his vigorous dissent in *Houltin II:*

> That no court has ever excluded evidence in a comparable fact situation does not mean a decision to exclude would extend the exclusionary rule. It probably means that no prosecutor has ever dared to attempt to use the procedure sanctioned by the Court today. *Ibid.*, at p. 1038.

Lastly, the writ should be granted because, as Judge Wisdom warned in *Houltin II*, at p. 1038, we will see *Houltin* reenacted again. Should this honorable Court see fit to deny a writ of certiorari in this case, *Houltin II* will become the law for the large area of the nation encompassed by the Fifth Circuit. There, the *Houltin* drama will be replayed. Any evidence, no matter how tainted, will be utilized in conspiracy prosecutions if at least one co-conspirator lacks standing to challenge it. All of the defendants will be convicted and sentenced. Those defendants who have standing will prevail in the appellate courts, only to face retrial under the Government's reading of *Burks*. At this retrial, those defendants with standing will be subjected to compelled testimony against them by those defendants whose convictions were affirmed because of lack of standing and who were granted the "empty" *Houltin* immunity, as in our case. Thus, the exclusionary rule will cease to operate in any case in-



volving multiple defendants where one defendant has a standing problem. Aside from the fatal blow to the exclusionary rule, the *Houltin* "procedure" would also deal a blow to the Appellate Courts. Having to go through a ritual of first reversing, then affirming in such cases would tend to diminish the dignity of these courts in the eyes of all onlookers, including defendants, defense counsel, prosecutors, and law enforcement officers alike. This is the future that *Houltin II* portends.

In *Houltin I*, at 951-952, Judge Wisdom pointed to the probable culpability of this Petitioner, and he also notes in both *Houltin I* and *II* that the issues involved herein could be deemed merely procedural in nature. In this regard, the petitioner would argue to this Court that guilt or innocence in this nation is not determined by lot or by divination, but instead by the correct and steady application of those procedures and principles embodied in our great tradition of criminal justice. It is with this in mind, that the petitioner respectfully requests that this Court accept the burden of applying those procedures and principles in his cause through granting a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOSEPH S. CHAGRA
Attorney for Petitioner
Suite 718, Southwest Center
300 East Main
El Paso, TX 79901
(915) 533-4087

JOSEPH (SIB) ABRAHAM, JR.

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CHARLES LOUIS ROBERTS

Attorneys for Petitioner
505 Caples Building
El Paso, TX 79901
(915) 532-1601

**CERTIFICATE OF SERVICE**

The undersigned attorney certifies that on the ____ day of August, 1978, he served three copies of the foregoing Reply Brief upon the opposing counsel by placing them in the United States Mail with proper postage affixed, addressed to:

Wade H. McCree, Jr.,
Solicitor General,

Philip B. Heymann,
Assistant Attorney General,

Jerome M. Feit,
Elliott Schulder,
Attorneys,
Department of Justice,
Washington, D.C. 20530

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CHARLES LOUIS ROBERTS
Attorney for Petitioner
505 Caples Building
El Paso, Texas 79901
(915) 532-1601